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No. 973

IN THE

SUPREME COURT OF THE UNITED STATES

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

JURISDICTIONAL STATEMENT

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R—Record
V—Volume

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. .....

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,

Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida entered on the 5th day of November, 1962, denying the petition of the Appellants for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Second District, affirming the judgment of the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida; and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The denial of Appellants' petition for a Writ of Certiorari to the Supreme Court of Florida is not reported. The opinion of the District Court of Appeal of Florida, Second District, is reported in 143 So.2d 58 (Fla. App. 1962). The opinion of the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, is not reported. Copies of the judgments below are attached hereto as Appendix A.

JURISDICTION

The Zoning Board of Appeals of Pompano Beach, Florida, denied Appellants' petition for a building permit under the zoning code of that city. The Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, entered a judgment on the 12th day of October, 1960, quashing its Writ of Certiorari to review the Zoning Board of Appeals' denial of the permit. The District Court of Appeal of Florida, Second District, entered a judgment affirming the Circuit Court judgment on the 27th day of June, 1962. The Supreme Court of Florida entered a judgment denying Appellants' petition for a Writ of Certiorari on the 5th day of November, 1962, and notice of appeal was filed in that court on the 1st day of February, 1963. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on direct appeal in this case: *Zucht* v. *King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721; *Rein-*

man v. *City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Staub* v. *City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed. 2d 302; *Jamison* v. *Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; *Ward* v. *Board of County Com'rs*, 235 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751.

STATUTES INVOLVED

ORDINANCE NUMBER 664, CHAPTER 50, Sections 50.189 (1) (1) (1)-(5) and 50.26, Zoning Code, Code of Ordinances. City of Pompano Beach, Florida, 1958; and Section 1 of the 14th Amendment of the Constitution of the United States of America are set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. Whether ordinances of the City of Pompano Beach, Florida, which prohibit the Appellants from erecting a gasoline filling station within seven hundred fifty feet of another gasoline filling station along the same street, while allowing others similarly situated to do so, and which at the same time permit gasoline filling stations only one hundred fifty feet from public assemblies, theatres, auditoriums and other places of public congregation are an improper exercise of state police power, which exercise denies Appellants equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States of America.

2. Whether ordinances of the City of Pompano Beach, Florida, which prohibit the Appellants from erecting a gasoline filling station within seven hundred fifty feet of another gasoline filling station, while allowing others

similarly situated to do so, and which at the same time allow gasoline filling stations to be erected back to back and side to side within seven hundred fifty feet of each other, provided they are not along the same street, are an improper exercise of state police power, which exercise denies Appellants equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States of America.

STATEMENT

The Appellant, Pompano Fair Realty Co., a Florida corporation, is the lessee under a 99 year lease of certain land located in Pompano Beach, Florida, described as follows:

> All that part of the SE ¼ of the NE ¼ of the SE ¼, less the North 275 feet thereof, except the West 130 feet of Section 36, Township 48 South, Range 42 East, lying West of the West Right-of-Way of Federal Highway (U.S. #1), Pompano Beach, Broward County, Florida, also known as 401 North Federal Highway.

Appellant, Food Fair Stores, Inc., a foreign corporation, authorized to do business in the State of Florida, is a sub-lessee of the above-described property. Appellee, the Zoning Board of Appeals, is an agency of the municipal corporation existing under the laws of the State of Florida, known as the City of Pompano Beach, Florida.

On March 29, 1960, the Chief Building Inspector of the City of Pompano Beach, Florida, refused Appellant, Food Fair Stores, Inc., a building permit to erect a gasoline filling station on the above-described property (R-V I-3), such denial being under the authority of Ordinance No. 664, section 50.189 (1) (l) (1) of the City of Pompano Beach, Florida, which provides, in part:

> "No filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. . . ."

and upon the ground that there already existed a gasoline filling station within 750 feet of the proposed site of the station of Appellant, Food Fair Stores, Inc.

On July 14, 1960, Food Fair Stores, Inc., filed an appeal of the decision of the Chief Building Inspector with the Zoning Board of Appeals of the City of Pompano Beach, Florida (R-V I-7), the next and highest administrative authority having jurisdiction thereof, which appeal was orally amended to include Pompano Fair Realty Co. as co-appellant.

On August 26, 1960, the Zoning Board of Appeals denied the request of the Appellant to issue the building permit (R-V I-10), the Board also acting under authority of Ordinance No. 664, section 50.189 (1) (1) (1). The Appellants herein then filed a petition for a Writ of Certiorari, under Florida Statute 176.16, *et seq.*, in and to the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, alleging in said Petition, among other things:

> "That Ordinance 664 § 50.189 (1) is repugnant to the 14th Amendment of the Constitution of the United States because it deprives Petitioners of their property without due process of the law and fails to accord them the equal protection of the law." (R-V I-3)

The Circuit Court of Broward County, Florida, issued its Writ of Certiorari on October 12, 1960 (R-V I-20) and a Final Hearing was had thereon on July 19, 1961 (R-V I-[illegible]). On August 23, 1961, the Circuit Court entered a Final Judgment [See Appendix A] (R-V I-54) quashing the

Writ. In the opinion accompanying the judgment the Court stated, *inter alia*:

> "Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional." (R-V I-55)
>
> "It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a proper exercise of the zoning and police power of the City of Pompano Beach, Florida." (R-V I-56)

Thereupon, the Appellants herein filed a timely appeal of the judgment of the Circuit Court of Broward County to the District Court of Appeal of Florida, Second District (R-V I-57), and listed, *inter alia*, in their Assignments of Error that:

> "The Court erred in its Final Judgment in finding that the Zoning Code, and ordinances in question, as it pertains to the Appellants here, was a constitutional and proper exercise of the zoning and police power of the City of Pompano Beach, Florida." (R-V I-58)

In an opinion filed June 27, 1962 [See Appendix A] (R-V I-64), the District Court of Appeal affirmed the Circuit Court, citing with approval the lower court's recognition that "Petitioners here attack the ordinance on the sole ground that the ordinance is unconstitutional", and stating, *inter alia*:

> "We find nothing unreasonable in the ordinance hereinabove discussed, and therefore, affirm the lower court." (R-V I-70)

Thereafter Appellants herein filed in the Supreme Court of Florida a Petition for a Writ of Certiorari from the District Court of Appeal, Second District, State of

Florida, reciting in said petition that the District Court of Appeal was presented with, *inter alia,* the following point of law:

> "Whether the Court below erred in determining that an ordinance of the City of Pompano Beach prohibiting the Appellant from erecting a gasoline filling station within seven hundred fifty feet of another station along the same street, while allowing others to do so and while permitting gasoline filling stations only one hundred fifty feet along the same street from public assemblies, theatres, auditoriums and other places where people congregated, gave equal protection of the law as provided by Sections 1 and 12 of the Declaration of Rights of the Florida Constitution and the Fourteenth Amendment to the Constitution of the United States of America."

and that "on these points of law the District Court of Appeal, Second District, found nothing unreasonable in the ordinance."

The Supreme Court of Florida, without opinion on the merits, on November 5, 1962, ordered that Appellants' Petition for Writ of Certiorari be denied.

Appellants then filed notice of Appeal to the Supreme Court of the United States on February 1, 1963.

THE QUESTIONS ARE SUBSTANTIAL

The exercise of state legislative power to deprive an individual, natural or corporate, of the fair use and enjoyment of his or its property under circumstances wherein the individual is not treated in the same manner as others similarly situated, and wherein regulation is imposed which is not reasonably related to the purpose of correcting the evil sought to be corrected is an exercise of power which cannot be tolerated under the 14th Amendment.

It is well settled that corporations are "persons" within the meaning of the 14th Amendment, *Santa Clara County* v. *Southern Pac. R. Co.*, 118 U.S. 394, 6 S.Ct. 1132, 30 L. Ed. 118; *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666; *Smith* v. *Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819; that a muncipal ordinance is a state statute constituting state action within the meaning of the 14th Amendment, *Reinman* v. *City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721; *Zucht* v. *King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; and that zoning regulations are a valid and legitimate exercise of the state police power to legislate for the protection of the health, safety and general welfare of the people within its borders, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. However, the power of the state and its instrumentalities to regulate is not without limit just because the power is exercised within a legitimate sphere. Such power is subject to limitations wherein certain fundamental individual rights will not be suffered to be surrendered.

It is clear that the State in implementing its police powers may establish classifications of individuals and groups for the purpose of legislating to control conduct inimical to the common good. Legislative regulation may also extend to absolute prohibition. *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. But there is the limitation that classification and prohibition must be reasonable in the sense that all those who are similarly situated must be treated alike. *Southern R. Co.* v. *Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536; *Barbier* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923; *Soon Hing* v. *Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145. Both

classification and prohibition must bear a reasonable relation to the evil sought to be corrected. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews,* 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909.

The questions in this cause are substantial because they involve (1) state legislation in the form of an ordinance which contains an unreasonable classification wherein there is arbitrary discrimination against the Appellants and in favor of others similarly situated; (2) regulation which does not bear a reasonable relation to the evil sought to be corrected, especially in view of the unreasonable classification, and (3) judicial sanction of the consequent denial of equal protection of the law by refusal to adequately rule on this federal question presented below.

Let us consider first the question of the reasonableness of the classification established under City of Pompano Beach Ordinance No. 50.189 which provides:

> Within any business "3" retail business district, as indicated on the zone plan, no building or premises shall be erected, used, arranged, or designed to be used in whole or in part for any industrial or manufacturing purposes, or for any other than one or more of the following specified uses:
>
> (1) PRINCIPAL USES
>
> (1) Filling stations for automotive vehicular service subject to the following provisions:
>
> 1. No filling station for automotive type service shall hereafter be constructed within seven hundred and fifty feet on a direct line measured along a street

from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. Distance limitations do not apply to stations not along the same street having both entrance and exit along a different street. Pumps or pump islands shall not be located closer than fifteen feet from any street line. . . .

4. Provided further that this section shall not apply to property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A.D., 1957, by any bonded gasoline distributor or his agent, dealer, leasee or consignee.

The ordinance provisions with which we are concerned [Sections (1) (1) (1) and (1) (1) (4)] establish two different groups. One group *is not* allowed to devote its property to the use of a gasoline filling station within a prescribed area. Another group, "bonded gasoline distributors" their "agents, dealers, leasees or consignees" [which said group is not further defined anywhere in Ordinance No. 664, Chapter 50], *is* allowed the privilege of devoting its property to such use. The Appellants, in any event, are not "bonded gasoline distributors", nor "agents, dealers, leasees or consignees" thereof. Section (1) (1) (1) sets out the prohibited use in terms which apply to all equally. Section (1) (1) (4) creates an exception in favor of "bonded gasoline distributors" their "agents, dealers, leasees or consignees" who owned or leased property within the prescribed area prior to August 13, 1957. The ordinance on its face denies Appellants equal protection of the law unless there is some reasonable basis for allowing a distinction between bonded gasoline distributors, who were owners or lessees of property

as of August 13, 1957, and everyone else who may desire to erect a filling station. Legislative discriminations which are open to objection are those wherein persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is then that the discrimination can be said to impair the equal rights which all can claim under the law. *Soon Hing* v. *Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145. There is no apparent reason for the exception in favor of "bonded gasoline distributors" because in the economic sense they have no greater right to engage in the business of operating gasoline filling stations and enjoy the use of their property for that purpose within the area in which the use is prohibited than any other group. Nor for that matter is there any basis of differentiation between bonded gasoline distributors who owned or leased property within the area prior to August 13, 1957, and bonded gasoline distributors who became owners or lessees after that date and were not agents, dealers, lessees or consignees of the former. The granting of a special privilege to one portion of a group similarly situated is the same as a denial of a right to all others in the group.

The classification made by the City under this ordinance is clearly arbitrary and unreasonable. It has the effect of denying Appellants the right to enjoy the use of their property while allowing others to do so. It limits competition against existing gasoline filling stations to "bonded gasoline distributors", their "agents, dealers, leasees or consignees" who owned or leased property prior to August 13, 1957. And it has the economic effect of creating a monopoly in favor of existing stations and those allowed to be constructed by the excepted group.

Next let us consider the question whether under section 50.189 of the ordinance the prohibited use and the

exception in favor of bonded gasoline distributors are reasonably related to the evil sought to be corrected.

In the case of gasoline filling stations the health and safety interests of the public are threatened by the hazards of fire, explosion, noxious odors, fumes, and so forth. Within a geometric frame of reference these hazards are such that they would have a radial effect on surrounding property and persons. These hazards pose a threat to all surrounding persons and property in many directions or all directions at once, not just up and down a given street on a "direct line." Thus, limiting gasoline stations to a minimum distance between them of 750 feet along the same street does not inhibit the effect of these hazards.

Assume however, that such a straight-line distance limitation is reasonably related to minimizing these or some other hazards. Where a police measure amounts to a prohibition, the policy of prohibition implies an evil or danger of exceptional magnitude, and any exception not merely allows a partial perpetuation of the evil or danger, but in addition may give to those excepted a monopoly instead of a mere advantage. Freund, *Police Power*, §686. Where a restraint is confined to a particular group or class, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted; and where the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil where it is outweighed by great benefits. Freund, *Police Power*, §738.

The structure proposed to be erected by the Appellants meets all other requirements of the Appellee as to safety. Under the facts of this case if the prohibition is reasonably related to minimizing the dangers incident to

the existence of a gasoline filling station then the policy of prohibiting stations within the prescribed distance must be one of prohibiting all; the excepted class under this ordinance is neither free from the danger nor does the fact of operation of gasoline filling stations by that class tend to reduce the danger because the hazards inhere in the nature of the business.

The courts below in upholding the ordinance have chosen to deal only with the surface issue as to whether or not exercise of the police power in general to regulate filling stations is legitimate. The more narrow issue of denial of equal protection of the law as herein set out has not been adequately considered. The Circuit Court in finding the ordinance "constitutional", the District Court of Appeal in finding "nothing unreasonable" in the ordinance, and the Supreme Court of Florida in declining to consider the question of denial of equal protection of the law under the 14th Amendment have all either skirted or erroneously decided the question. Yet the state courts have necessarily decided the federal question involved here because the effect of upholding the ordinance is to deny the Appellants equal protection of the law guaranteed under the 14th Amendment.

This Court has held that constitutional rights are denied as well by the refusal of state courts to decide a federal question as by an erroneous decision of it, *Lawrence v. State Tax Comm.*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; that a state court may not avoid deciding federal questions and thus defeat jurisdiction of the United States Supreme Court by putting forward non-federal grounds of decision which are without any fair or substantial support; that whether constitutional rights were given due recognition is a question as to which this Court's judgment may be invoked; and that it is within the province of

this Court to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect. *Staub* v. *City of Baxley;* 355 U.S. 313, 78 S.Ct. 279, 2 L.Ed. 2d 302; *Ward* v. *Board of County Com'rs,* 235 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751.

The Appellants therefore respectfully urge this Court to accept jurisdiction to determine the questions presented.

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APPENDIX A

Text of Opinions and Judgments Below

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BROWARD COUNTY. AT LAW.

FOOD FAIR STORES, INC., etc., et al., Petitioners, vs. THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, Respondent.	No. L60-519C

Final Judgment

This cause was duly presented by certiorari from the Zoning Board of Appeals of the City of Pompano Beach, Florida. Extensive testimony was taken before this Court under authority of the cases of State v. Furen, Fla., 118 So.2d 6; Josephson v. Autrey, Fla., 96 So.2d 784; and Union Trust Company v. Lucas, Fla., 125 So.2d 582. This testimony, all pleadings and exhibits, and the advice of counsel have been considered.

Petitioners wish to erect a gasoline service station upon certain property leased by them in Pompano Beach, Florida. Their wishes were frustrated by Ordinance No. 664, § 50.189(1) of the City of Pompano Beach which provides, inter alia, that no filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner

of any lot, piece or parcel of land, abutting the same street, used for such purposes. The proposed station would be located at a street intersection, two corners of which are already occupied by gasoline service stations, and thus the proposal is exactly prohibited by the ordinance.

The Chief Building Inspector denied Petitioner's request for permissing [sic] to build whereupon Petitioners appealed to the Zoning Board of Appeals for a variance based on hardship. This appeal was properly denied.

Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional.

The criteria to be used by the Court in construing the validity of an ordinance is found in the case of Miami v. Kayfetz, Fla., 98 So.2d 798, where the Supreme Court promulgated these rules:

> "(1) In construing the validity of the ordinance in question we must: (1) assume that a valid ordinance was intended. State ex rel. Ellis v. Tampa Water Works Co., 1908, 56 Fla. 858, 47 So. 358, 19 L.R.A., N.S., 183; (2) construe the ordinance to be legal, if possible to do so, and strive to so construe it as to give reasonable effect to its provisions, State ex rel. Rand v. Brogden, 1922, 84 Fla. 520, 94 So. 653, Bentley-Gray Dry Goods Co. v. City of Tampa, 1939, 137 Fla. 641, 188 So. 758.
>
> (2) Further, the courts should be very cautious in declaring a municipal ordinance unreasonable, there being a peculiar propriety in permitting the inhabitants of a City through its proper officials to determine what rules are necessary for their own local government. State ex rel. Harkow v. McCarthy, 1936, 126 Fla. 433, 171 So. 314, City of Tacoma v. Keisel, 1912, 68 Wash. 685, 124 P. 137, 40 L.R.A., N.S., 757.
>
> (3-5) Where an ordinance is within the power of the municipality to enact it is presumed to be reason-

able, unless its unreasonable character appears on its face. State ex rel. Harkow v. McCarthy, supra; State ex rel. McAuley v. York, 1925, 90 Fla. 625, 106 So. 418. And when the authority to enact the ordinance does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of authority or a violation of organic or fundamental rights. State ex rel. Simpson v. Ackerly, 1915, 69 Fla. 23, 67 So. 232. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State ex rel. Skillman v. City of Miami, 1931, 101 Fla. 585, 134 So. 541."

As early as 1929, the Supreme Court of Florida in the case of Harz v. Paxton, Fla., 120 So. 3, recognized that the operation of gasoline filling stations involved acts which are potential menaces to public safety and health. The hazard has increased account of the greater number and speed of automobiles coupled with the problems of traffic, pedestrian and vehicular, in entering and leaving such stations. Accordingly, this Court's opinion is that gasoline service stations constitute an appropriate subject for municipal regulation.

Is the regulation in question reasonable and does it bear correct relation to the health, safety and general welfare of the citizens of Pompano Beach? This Court finds it to be proper using the mentioned criteria and under the authority of the case of State v. Peace, Fla., 190 So. 607. See also, 35 Fla. Jur., Zoning Laws, § 15.

The thrust of Petitioner's brief suggesting that the purpose of the ordinance was to limit competition finds no real basis in the record.

It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a

proper exercise of the zoning and police power of the City of Pompano Beach, Florida.

Accordingly, it is

ORDERED and ADJUDGED that the Writ of Certiorari heretofore issued by this Court be and the same is hereby quashed, and the above entitled cause is hereby dismissed at Petitioner's costs.

Copy furnished counsel.

DONE and ORDERED this 23rd day of August, 1961.

/s/ JAMES H. WALDEN,
CIRCUIT JUDGE.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JANUARY TERM, A. D. 1962

FOOD FAIR STORES, INC., etc., et al.,
Appellants,

vs.

ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

Case No. 2871

Opinion filed June 27, 1962.

Appeal from the Circuit Court of Broward County; James H. Walden, Judge.

Alfred Aronovitz of Aronovitz, Aronovitz & Haverfield, Miami, for Appellants.

Bruno Di Giulian, Pompano Beach, for Appellee.

ALLEN, ACTING CHIEF JUDGE.

Appellants, petitioners below, are appealing from a final judgment quashing their petition for writ of certiorari to review a decision of appellee-respondent, Zoning Board of Appeals.

Section 50.189 (I) (1) of Ordinance 664 of the City of Pompano Beach provides inter alia:

"I. PRINCIPAL USES.

"(1) Filling stations for automotive vehicular service subject to the following provisions:

"(1) No filling station for automotive type service shall hereafter be constructed within seven hun-

dred and fifty feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. . . ."

Pursuant to the provision in the Ordinance set forth above, the Chief Building Inspector of Pompano Beach refused appellants a building permit to erect a gasoline filling station. Appellants appealed to the Zoning Board of Appeals seeking a variance based on hardship which was denied.

Certiorari, attacking the constitutionality of the Ordinance, was taken to the Circuit Court and the decision of the zoning board was upheld. The Circuit Judge, in his well-reasoned opinion quashing the writ, said:

"This cause was duly presented by certiorari from the Zoning Board of Appeals of the City of Pompano Beach, Florida. Extensive testimony was taken before this Court under authority of the cases of State v. Furen, Fla., 118 So.2d 6; Josephson v. Autrey, Fla., 96 So.2d 784; and Union Trust Company v. Lucas, Fla., 125 So.2d 582. This testimony, all pleadings and exhibits, and the advice of counsel have been considered.

"Petitioners wish to erect a gasoline service station upon certain property leased by them in Pompano Beach, Florida. Their wishes were frustrated by Ordinance No. 664, §50.189(1) of the City of Pompano Beach which provides, inter alia, that no filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. The proposed station would be located at a street intersection, two corners of which are already occupied by gasoline service stations, and thus the proposal is exactly prohibited by the ordinance.

"The Chief Building Inspector denied Petitioner's request for permission to build whereupon Petitioners appealed to the Zoning Board of Appeals for a variance based on hardship. This appeal was properly denied.

"Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional.

"The criteria to be used by the Court in construing the validity of an ordinance is found in the case of Miami v. Kayfetz, Fla., 92 So.2d 798, where the Supreme Court promulgated these rules:

"'(1) In construing the validity of the ordinance in question we must: (1) assume that a valid ordinance was intended. State ex rel. Ellis v. Tampa Water Works Co., 1908, 56 Fla. 858, 47 So. 358, 19 L.R.A., N.S., 183; (2) construe the ordinance to be legal, if possible to do so, and strive to so construe it as to give reasonable effect to its provisions, State ex rel. Rand v. Brogden, 1922, 84 Fla. 520, 94 So. 653, Bentley-Gray Dry Goods Co. v. City of Tampa, 1939, 137 Fla. 641, 188 So. [illegible]3.

"'(2) Further, the courts should be very cautious in declaring a municipal ordinance unreasonable, there being a peculiar propriety in permitting the inhabitants of a city through its proper officials to determine what rules are necessary for their own local government. State ex rel. Harkow v. McCarthy, 1936, 126 Fla. 433, 171 So. 314, City of Tacoma v. Keisel, 1912, 68 Wash. 685, 124 P. 137, 40 L.R.A., N.S., 757.

"'(3-5) Where an ordinance is within the power of the municipality to enact it is presumed to be reasonable, unless its unreasonable character appears on its face. State ex rel. Harkow v. McCarthy, supra; State ex rel. McAuley v. York, 1925, 90 Fla. 625, 106 So. 418. And when the authority to enact the ordinance does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of

authority or a violation of organic or fundamental rights. State ex rel. Simpson v. Ackerly, 1915, 69 Fla. 23, 67 So. 232. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State ex rel. Skillman v. City of Miami, 1931, 101 Fla. 585, 134 So. 541.'

* * *

"Is the regulation in question reasonable and does it bear correct relation to the health, safety and general welfare of the citizens of Pompano Beach? This Court finds it to be proper using the mentioned criteria and under the authority of the case of State v. Peace, Fla., 190 So. 607. See also, 35 Fla. Jur., Zoning Laws, §15.

"The thrust of Petitioner's brief suggesting that the purpose of the ordinance was to limit competition finds no real basis in the record.

"It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a proper exercise of the zoning and police power of the City of Pompano Beach, Florida."

Extensive testimony was taken in this case which included testimony of a professional traffic engineer, whose summarized testimony was to the effect that it is desirable to separate pedestrian and vehicular traffic; that marginal access points upon streets create greater traffic problems; that there is a traffic problem at the intersection where the gasoline station proposed by appellants was to be located and that the investment of the public in relation to U. S. Highway No. 1, an arterial highway, would thereby be destroyed; and that the indiscriminate construction of drive-in type businesses along arterial streets and on corners has a detrimental effect on vehicular and pedestrial [sic] traffic. Also testifying was the Director of Planning for Broward County, who stated that the planners gave special

consideration to gasoline stations because of problems peculiar to such businesses, including fire hazards, traffic hazards, pedestrian hazards and related problems; the necessity for complete prohibition of gasoline stations in certain areas; and the concern for certain esthetic considerations. There was also testimony concerning the location of public schools in close proximity to the intersection in question. The appellants strenuously argued that this zoning along distinct lines was done to create a monopoly, etc., in certain situations. The Circuit Judge specifically found against the appellants on this question.

As early as 1929, the Supreme Court of Florida, in Harz v. Paxton, 1929, 97 Fla. 154, 120 So. 3, in an opinion written by then Chief Justice Terrell, said:

> "We have examined the record, and it appears that the city of Sanford is fully authorized to zone the city and to regulate by ordinance the issuance of building permits such as are here involved. When the ordinance in question and the action of the city officials pursuant thereto are considered with reference to the rules applicable to the exercise of the police power in the regulation of the erection of filling stations and public garages, the operation of which involves acts which are generally recognized as potential menaces to the public safety and health because of the storage and handling therein of highly inflammable and explosive substances, it does not appear that in denying the permit here sought the respondent city officials have acted arbitrarily or unreasonably. See State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500; A. G. Construction Co. v. Scott, 136 A. 207, 5 N.J. Misc. R. 251; Cayce v. Hopkinsville, 217 Ky. 135, 289 S.W. 223; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State ex rel. Manhein v. Harrison, 164 La. 564, 114 So. 159. A different rule, however, might apply when buildings or businesses of innoxious character are involved. See State of

Washington ex rel. Seattle Title Trust Co. v. Roberge, 49 S. Ct. 50, 73 L. Ed.—; Dillon, Munic. Corp. (5th Ed.) §598."

In State v. Peace, 1939, 139 Fla. 394, 190 So. 607, the Supreme Court again had before it an ordinance in which the regulations of gasoline and oil filling stations was involved. The particular ordinance quoted in the opinion is as follows:

"'No gasoline and oil filling station and no service station shall be erected or located within 350 yards of any church, hospital, school or other such institution, where large numbers of pedestrians congregate, or within 750 feet of the location of another gasoline and oil filling station or service station.'"

Mr. Justice Terrell again wrote the opinion of the court, in which he said:

"The question of the City's power to enact the ordinance being disposed of in the affirmative, the question of whether or not that power was exercised in an arbitrary and unreasonable manner becomes very narrow, besides being a delicate one for the Courts to treat. Standards of business, social and professional conduct have their variations peculiar to every community. These standards such ordinances as that brought in question are designed to regulate and the manner of their regulation is distinctly a legislative function. If the ordinance is enacted in the interest of the public and is designed to correct an evil or evils that are or may affect the public welfare, it should be upheld. The manner in which these purposes are accomplished is one in which legislative discretion has a very broad range and courts should not attempt to substitute their judgment for that of the legislature, City Commission, or other legislative body created for that purpose.

"Measured by this standard, we cannot say that the ordinance is amenable to the assault made on it. Cer-

tainly it does not transgress the range of legislative discretion. . . ."

The court will take judicial notice of the tremendous increase in automobile traffic and the increasing problems confronting municipal authorities at the present time, as well as those prevalent at the time of the two opinions above set forth.

In a recent opinion by the Superior Court of New Jersey, Socony Mobil Oil Company v. Township of Ocean, N.J. Super. 1959, 153 A.2d 67, affirmed 157 A.2d 2, the court commented:

> "Municipalities have the power to regulate the location of gasoline stations within their boundaries, and even to prohibit them in certain zones where the facts warrant it. Schmidt v. Board of Adjustment of City of Newark, supra; L. P. Marron & Co. v. River Vale Tp., 54 N.J. Super. 64, 148 A.2d 205 (App. Div. 1959). Distinctions may not be made between uses where there is no reasonable basis or ground for any difference in treatment as that would constitute a violation of our constitutionally guaranteed equal protection and due process of law. Washington National Ins. Co. v. Board of Review, 1 N.J. 545, 64 A.2d 443 (1949); 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), §25.123. However, a distinction will be presumed to be reasonable if there be any conceivable state of facts which support such action. The classification of gasoline service or filling stations for 'special regulation of such uses' has been sustained, as they are *sui generis* in that they are necessary to our present-day life, yet involve Schmidt v. Board of Adjustment of City of Newark, supra, 9 N.J. at page 422, 88 A.2d at page 615. Courts have taken judicial notice of the fact that the business of storing and handling gasoline at filling stations within a built-up area is attended with a peculiar degree of danger to life and property, due to its propensities and that the noxious odors, noise and traffic hazards emanating from the conduct

of such a business, makes the regulation of its location necessary and reasonable. Gore v. City of Carlinville, 9 Ill. 2d 296, 137 N.E.2d 368 (Sup. Ct. 1956); Hoffman v. Mayor and City Council of Baltimore, 187 Md. 593, 51 A.2d 269 (Ct. App. 1947); Albright v. Johnson, 135 N.J.L. 70, 50 A.2d 399 (Sup. Ct. 1946)."

See also City of San Antonio et al. v. Humble Oil & Refining Co., Texas 1930, 27 S.W.2d 868; Mayor and City Council of Baltimore v. Biermann, 1947, 187 Md. 514, 50 A.2d 804; and Adler v. City of Baltimore, 1959, 220 Md. 623, 155 A.2d 504.

We find nothing unreasonable in the ordinance hereinaboye discussed, and therefore, affirm the lower court.

Affirmed.

SMITH and WHITE, JJ., CONCUR.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962

MONDAY, NOVEMBER 5, 1962

FOOD FAIR STORES, INC., a foreign corporation, authorized to do business in Florida, and POMPANO FAIR REALTY CO., a Florida corporation,

Petitioners,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,

Respondent.

Case No. 31,987

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Second District, in said cause bearing date June 27, 1962, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

Guyte P. McCord
Clerk Supreme Court.

APPENDIX B

Text of Statutes and Provisions of Constitution Involved

ORDINANCE No. 664, CHARTER 50, ZONING CODE, CITY OF POMPANO BEACH, FLORIDA

Division 3. Building "3" Districts—Central Retail Businesses.

Sec. 50.189. Permitted uses.

Within any business "3" retail business district, as indicated on the zone plan, no building or premises shall be erected, used, arranged, or designed to be used in whole or in part for any industrial or manufacturing purposes, or for any other than one or more of the following specified uses:

(1) Principal Uses

(l) Filling stations for automotive vehicular service subject to the following provisions:

1. No filling station for automotive type service shall hereafter be constructed within seven hundred and fifty feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. Distance limitations do not apply to stations not along the same street having both entrance and exit along a different street. Pumps or pump islands shall not be located closer than fifteen feet from any street line.

2. A solid masonry perimeter wall three feet in height shall be provided along common lot lines. Such wall need not extend closer to a street right-of-way line than fifteen feet.

3. Nothing in this section shall prohibit the operation of existing gasoline and oil filling stations or service stations or the improvement, alteration or construction of any existing gasoline and oil filling stations or service stations.

4. Provided further that this section shall not apply to property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A. D., 1957, by any bonded gasoline distributor or his agent, dealer, leasee or consignee.

5. Provided that the applicable requirements as specified in section 50.26 of this chapter are met.

Sec. 50.26. Public garages, auto repair garage, bus terminals and filling stations.

No public garage, bus terminal, auto repair garage or filling station permitted in any district shall:

(1) Use processes in the pursuit of their services that shall be noxious or objectionable by reason of noise, odor, smoke, gas, dust, fumes, glare radiation (nuclear or other), vibration, fire or explosion hazard, that shall adversely involve the health, safety and general welfare of individuals and property, or the sanctity of the Sabbath, where said uses are located within two hundred feet of any established residential use, church, public park or public hospital.

(2) Use any part thereof for residence or sleeping purposes.

(3) If having capacity to accommodate more than five motor vehicles, have neither any part thereof, nor any driveway, entrance or exit to or from said uses within one hundred and fifty feet of the boundary line of any plot situated along the same street in

any district classification on which is located any structure used as a theatre, auditorium or other place of public assembly with seating capacity of over one hundred persons, or a church, hospital, or college, or within six hundred feet of a public school institution for dependents or children, or a public playground or athletic field, or similar recreational area. (Ord. 664, § 1.)

Constitution of the United States of America

Amendment XIV; Section 1: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."